Vee Vee Enterprises Ltd v Kenya Railways Corporation & another; Kenya Commercial Bank & 2 others (Garnishee) (Miscellaneous Civil Application E601 of 2021) [2024] KEHC 11207 (KLR) (Commercial and Tax) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E601 OF 2021

A MABEYA, J

SEPTEMBER 26, 2024

BETWEEN

VEE VEE ENTERPRISES LTD .... APPLICANT

AND

KENYA RAILWAYS CORPORATION .... 1ST RESPONDENT

MINISTRY OF TRANSPORT AND INFRASTRUCTURE .... 2ND RESPONDENT

AND

KENYA COMMERCIAL BANK .... GARNISHEE

EQUITY BANK KENYA LIMITED .... GARNISHEE

CENTRAL BANK OF KENYA .... GARNISHEE

RULING

1. This ruling is with respect to two applications namely, the application by the decree holder dated 29/7/2024 and the application dated 7/8/2024 by the judgment-debtor.

Application dated 7/8/2024

2. The application was brought under section 3 and 3A of the *Civil Procedure Act* CAP 21, Order 51 rule 1 of the *Civil Procedure rules*, section 88 of the *Kenya railways corporation Act* CAP 397. The application sought the that the orders made on 31/7/2024 be discharged and set aside.

3. It was supported by the grounds presented and by the affidavit of Philip J. Maina sworn on 7/8/2024. The applicant contended that the decree/holder made an application to attach Kshs. 525,448,335.92 awarded in an arbitration award made on 24/3/2021.

4. The Court allowed the application and issued a garnishee order nisi on 31/7/2024 resulting in the freezing of the applicant's bank accounts with the 1st and 2nd garnishees. The applicant claimed that the garnishee order nisi had severely hampered its operations, bringing them to a halt. Furthermore, that the order was granted ex-parte based on misrepresentation of facts.

5. The applicant asserted that the unpaid VAT amounted to Kshs 133,415,375.77, with outstanding interest of Kshs 119,877,145.20 and arbitration costs totaled Kshs 10,787,244.40, plus interest.

6. That the applicant had received guidance from the Attorney General regarding how to facilitate the settlement, but both the applicant and the 2nd respondent were unable to settle the principal amounts due to the agency notices they had received.

7. It was also contended that the process of settling the owed amounts had been ongoing but was not yet complete. That the 2nd respondent, through the National Treasury, was responsible for settling these amounts since the RAP Project received partial government funding. That additionally, the KRA was considering waiving the accrued interest which would significantly lower the sums claimed by the decree holder.

8. The applicant argued that the garnishee application was premature and poorly advised. The accounts in question are vital revenue accounts essential for the applicant's daily operations. Therefore, it would serve the interests of justice to discharge the order nisi made on 31/7/2024 to unfreeze the garnished accounts.

9. The decree-holder filed a preliminary objection on 12/8/2024. It contended that the debtor's application was inadmissible, incompetent, and fundamentally flawed for violating Order 9, Rule 9 of the *Civil Procedure Rules*. That it had been filed by MS Jamal Bake & Associates Advocates, who appeared for the judgment-debtor without leave of court or consent from the former advocates.

10. It was further contended that the annexures to both the supporting and replying affidavits sworn on 7/8/2024 violated the mandatory requirements of Rule 9 of the *Oaths and Statutory Declarations Rules*, which stipulate that all exhibits must be sealed by a commissioner and marked with serial identification letters. That the annexures labeled PM1 through PM10 attached to Philip J. Maina's affidavits were not commissioned or serialized as required.

Application dated 29/7/2024

11. This application was brought under Order 51 rule 1 and Order 23 rule 2 of the *Civil Procedure rules*, section 88(a) of the *Kenya Railways Corporation Act* and sections 1A, 1B and 3A and 34 of the *civil Procedure rules*. It sought that the garnishee order be made absolute against judgment-debtor's bank accounts held with the garnishees. That all funds in the said accounts be sufficient to fully satisfy the decree issued on 14/6/2022. It further sought to compel the judgment-debtor's managing director to ensure that the decretal sums and interest are charged to the accounts held by the garnishees.

12. In support of the application, the decree-holder relied on the grounds on the face of the Motion and the supporting affidavit sworn by Ram Gadapali on 29/7/2024.

13. It was contended that a final award in favour of the applicant was published on 24/3/2024 for a sum of Kshs 133,415,375.97 and interest of Kshs 119,877,145.20 at the rate of 14.5% per annum. That the

arbitrators taxed the decree holder's costs at Kshs 10,787,244.40 together with interest. That despite several demands, the judgment debtor had failed to satisfy the decretal sum which continue to accrue interest until payment in full.

14. That *vide* a letter dated 18/8/2022, the Solicitor General had advised the judgment-debtor to specifically settle the arbitral award. That the total amount inclusive of interest stood at Kshs 525,448,355 as at 25/7/2024. That the judgment-debtor held accounts with the garnishees and a holding account with the Central Bank of Kenya. That the judgment debtor had enough funds to satisfy the decretal sum, costs and interest accrued.

15. The 2nd garnishee filed a replying affidavit sworn by its operations manager Samuel Kamau on 7/8/2024. He stated that the account held by the 2nd garnishee had Kshs 19,639,868.78 and that from 28/7/2024, the judgment- had not deposited any funds to the account.

16. The judgment-debtor opposed the application vide a replying affidavit of Philip J. Maina sworn on 7/8/2024. It was contended that the 2nd respondent was responsible for settling the outstanding VAT arrears. That the Attorney General had recommended that the judgment-debtor work with the applicant to determine the amount due. That multiple meetings had been held with representatives from KRA, the National Treasury and the Attorney General's office to discuss how to proceed.

17. That given this context, the process to resolve the owed amounts was not yet complete. That it was expected that once KRA adjusts the accrued interest on the principal sum, the total amount claimed would be substantially reduced. It was contended that the application was premature, poorly advised, and intended to delay the settlement process. The funds requested by the decree holder are essential for supporting the judgment-debtor's projects and other critical operations.

18. Furthermore, it was contended that the RAP Project, funded by the Government of Kenya and the World Bank, required the 2nd respondent to make payments through the National Treasury. That the 2nd respondent was responsible for settlement of the outstanding VAT arrears.

19. The 1st garnishee opposed the application vide a replying affidavit sworn by Gordon Winani on 6/8/2024. He stated that the amount in bank account 1108xxxxxx with the 1st garnishee account held a total sum of Kshs 105,047,672.28. That the amount was insufficient to cover the decretal sum in entirety. That the 1st garnishee was willing to abide by the orders of the Court.

20. The 3rd garnishee raised a preliminary objection on 7/8/2024 on the grounds that the application was contrary to the provisions of section 21(4) of the *Government Proceedings Act* and Order 23 rule 1 as read with Order 21 rule (2)(c) of the *Civil Procedure Rules* 2010. It was contended that the decree-holder had failed to follow the lawful procedure in execution set out in the case of *Five Star Agencies Limited A another v National Land Commission & 2others* (Civil Appeal E290 & 328 of 2023).

21. The decree-holder filed grounds of opposition dated 12/8/2024 in response to the preliminary objection. It contended that the judgment-debtor is a state corporation with the ability to sue and be sued under its corporate name. That the judgment-debtor is not a government department for the purposes of the Government Proceedings Act. In the premises, the *Government Proceedings Act* and Order 29 Rule 2(2)(c) of the *Civil Procedure Rules* were inapplicable.

22. The 3rd garnishee submitted that the 1st respondent is a state corporation established under Section 3 of the *Kenya Railways Corporation Act*, with operations and structure similar to that of the government. That that made Order 29 of the *Civil Procedure Rules* to be applicable.

23. Counsel submitted that the Court of Appeal found that the statute governing the execution of decrees against the government is outlined in Section 21 of the *Government Proceedings Act*. That in the case

of *Five Star Agencies Limited & Another v National Land Commission & 2 Others*(*supra*), the court stated that the only remedy available is to initiate judicial review proceedings and seek a mandamus order to compel the government to satisfy the decree.

24. It was further argued that, before a court can issue an order compelling the government to settle a decree, it must be demonstrated that the provisions of Section 21 of the *Government Proceedings Act* had been followed. That the parties had not agreed on costs or had them taxed, leading to the conclusion that the garnishee proceedings brought under Order 23 Rule 2, were incompetent and unsustainable.

25. The decree holder submitted that the judgment-debtor had been represented by the Attorney General throughout the arbitration and subsequent enforcement proceedings. That in light of Order 9 Rule 9 of the *Civil Procedure Rules*, it was necessary to seek leave or file a consent between the outgoing advocate and the new advocate once a judgment has been passed and a new advocate was coming on record.

26. Regarding the unmarked and unsealed annexures, counsel referred to the Court of Appeal's ruling in *Pharmacy and Poisons Board & Another v Mwiti & 21 Others*, wherein it was held that such documents hold no evidentiary value and should be expunged from the record. Counsel further argued that a state corporation is not a government department for the purposes of the *Government Proceedings Act*. That Section 88(a) of the *Kenya Railways Act* does not automatically exempt the judgment-debtor from fulfilling its decretal obligations.

27. Counsel submitted that the judgment-debtor's managing director had been inactive for over three years in satisfying the decree. That while funds were allocated for the financial year 2022/2023, they were ultimately returned to the National Treasury as unutilized.

Analysis

28. I have considered the contestations of the parties through the pleadings before Court, the rival submissions as well as the authorities cited. There are three issues for determination. These are;

    a. Whether the preliminary objections dated 12/8/2024 and 7/8/2024 are merited.

    b. Whether the orders of 31/7/2024 should be discharged and set aside.

    c. Whether the garnishee order nisi should be made absolute.

Preliminary objections

29. The principles that the Court is enjoined to apply in determining the merits or otherwise of a preliminary objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. It was held that a preliminary objection should be a point of law which if argued should dispose off the suit. It is in the nature of what used to be demurrer which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any of the facts are to be ascertained.

30. The decree-holder filed a preliminary objection dated on12/8/2024 premised on the ground that the judgment-debtor's application dated 7/8/2024 was inadmissible, incompetent, and fundamentally flawed for violating Order 9, Rule 9 of the *Civil Procedure Rules*. It was the decree holder's contention that the application was filed by MS Jamal Bake & Associates Advocates, for the judgment-debtor without leave of Court or consent from the former advocates.

31. Order 9, rule 9 of the *Civil Procedure Rules* provides: -

> " When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

32. Order 9, rule 10 provides: -

> " An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first."

33. The purpose of Order 9 rule 9 *Civil Procedure Rules* was discussed in the case of *Serah Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR where the Court stated: -

> " The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt…"

34. Additionally, in *Kazungu Ngari Yaa v Mistry v Naran Mulji & Co*. [2014] eKLR, the court held: -

> " The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."

35. The judgment-debtor's view was that it was represented by the office of the Attorney General and therefore the requirements of Order 9 rule 9 of the *Civil Procedure Rules* did not apply. On the other hand, the decree-holder submitted that leave was required for the firm of Ms. Jamal Bake & Associates Advocates to come on record for the judgment debtor.

36. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* are mandatory. The requirement underscores the necessity of either obtaining leave or filing a consent between the outgoing advocate and the new advocate after a judgment has been rendered. Failure to comply with this provision renders

subsequent applications or actions incompetent. It is designed to protect the interests of the outgoing advocate and it makes no exception.

37. In the present case, there was no leave that was sought by the firm of Ms. Jamal Bake & Associates Advocates to take over the representation. Even if the previous advocate was a State Counsel, there is no exception in Order 9. The judgment debtor's failure to seek the necessary court approval, whether through an oral or written application, undermines the validity of the subsequent actions taken. Further, no consent was recorded to allow the new advocates to come on record. As such, the application lodged by that firm cannot stand and the Court must regard the same as incompetent. In the premises, I find that the objection dated 12/8/2024 is merited and is upheld and the application dated 7/8/2024 is therefore struck out.

38. The other preliminary objection dated 7/8/2024 was raised by the 3rd garnishee. It was founded on the ground that the decree holder's application dated 29/7/2024 was contrary to *Government Proceedings Act* and Order 23 rule 1 as read with order 29 rule (2) of the *Civil Procedure Rules*.

39. The 3rd garnishee argued that section 21 of the *Government Proceedings Act* should be adhered to before the orders sought in the application can be issued. Learned Counsel submitted that in view of the holding in *Five Star Agencies Limited &Another v National Land Commission and 2 others* [2024] KECA 439, the only remedy available to the decree-holder was to institute Judicial Review proceedings.

40. Section 21 of the *Government Proceedings Act* outline the procedure with regard to execution of decrees against the government. It provides: -

> "Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
>
> Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant."

41. On the other hand, section 21 (3) of the *Act* provides: -

> "If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
>
> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein."

42. Section 21 (4) of the *Act* prohibits execution against the Government. It provides that: -

> " Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs."

43. It was the decree-holder's position that the judgment-debtor was not a government or a department of government and therefore, the provisions of the *Act* did not apply. Counsel submitted that state corporations are not government departments.

44. Section 2 of Cap 466 *State Corporations Act* defines a state corporation as follows: -

> " state corporation" means—
>
> (a) a state corporation established under section 3;
>
> (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—
>
> i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the *Treasury (Incorporation) Act* (Cap. 101);
>
> (ii) a local authority established under the *Local Government Act* (Cap. 265);
>
> (iii) a co-operative society established under the *Co-operative Societies Act* (Cap. 490);
>
> (iv) a building society established in accordance with the *Building Societies Act* (Cap. 489);
>
> (v) a company incorporated under the *Companies Act* (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;
>
> (vi) the Central Bank of Kenya established under the *Central Bank of Kenya Act* (Cap. 491);
>
> (vii) deleted by to *Act No. 2 of 2002*, Sch
>
> (c) a bank or a financial institution licensed under the *Banking Act* (Cap. 488) or other company incorporated under the *Companies Act* (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;
>
> (d) a subsidiary of a state corporation."

45. *Black's Law Dictionary*, 8th Edition defines the term "government" as being;

> " (1) The structure of principles and rules determining how a state or organization is regulated.

(2) The sovereign power in a Nation or State

(3) An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed."

46. In *Association of Retirement Benefits Scheme v Attorney General & 3 Others* [2017] eKLR, the High Court cited with approval the Indian Supreme Court case of *International Airport Authority of India & Others* (1979) SC.R 1042 in which the test for determining whether an entity was a Government body or not and was stated as follows: -

> "(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.
>
> (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
>
> (c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.
>
> (d) Whether the body has deep and pervasive State control;
>
> (e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and
>
> (f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government."

47. Further, in *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Others* [2015] eKLR, the court held: -

> "Foremost though, it is important to point out that it would not be tenable to invoke the *Government Proceedings Act* (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but it is not government or servant of or agent of Government for the purposes of the *Government Proceedings Act*. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body."

48. Based on the foregoing, it is evident where a body is not a government department but a corporation established under the *State Corporations Act* Cap 466, the provisions of the *Government Proceedings Act* cannot be invoked. It may fall or operate under the auspices of a government Ministry but it is not itself government or government department.

49. In the present case, the judgment-debtor is a corporation within the meaning of section 2 of Cap 466 *State Corporations Act*. The government works through departments and the judgment-debtor is a corporation established under the *Kenya Railways Corporation Act*.

50. Consequently, the judgment-debtor is not a government or government department and therefore is not subject to the provisions of section 21the *Government Proceedings Act*.

51. The difference between the case relied on by the 3rd garnishee and the present case is that, in that case the Court of Appeal was dealing with a Constitutional body established under the Constitution. In the present case, the judgment-debtor is a statutory body established under a statute with its own corporate seal capable of suing and being sued.

52. In this regard, I do not find the preliminary objection dated 7/8/2024 to be merited and the same is dismissed.

53. The third issue is whether the garnishee order nisi should be made absolute. Order 23 Rule 4 of the *Civil Procedure Rules* provides: -

> "If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require."

54. In *Otieno Ragot & Co Advocates v City Council of Nairobi* [2015] eKLR, it was held that: -

> "Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the Garnishee's indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable."

55. In this case, it is clear that the decree against the judgment-debtor has not been settled. The 1st garnishee has verified that the judgment-debtor maintains a bank account with a balance of Kshs 105,047,672.28, which, while substantial, is inadequate to fully satisfy the decretal sum. Similarly, the 2nd garnishee reports a balance of Kshs 19,639,868.78.

56. Despite these available funds, there has been no justification provided for why these amounts cannot be applied to partially settle the outstanding decree. The absence of any justification or rationale not to have settled the decree, leaves the Court with no alternative but to take appropriate action to facilitate the enforcement of the decree save for the garnishees' costs.

57. In respect to the 1st and 2nd garnishees, the Court finds that the decree-holder's claim is unchallengeable. I therefore allow the application and order that the decree nisi be made absolute in the following terms: -

    a. The 1st and 2nd garnishee do forthwith pay over to the decree holder all sums of money that stood in credit as at 29/7/2024 in the respective accounts held on behalf of the judgment-debtor save for costs of Kshs. 50,000/- for each of the garnishee.

    b. In respect of the 3rd garnishee, the Court finds that the decree-holder did not specifically disclose the general holding account that the 3rd garnishee holds in favour of the judgment-debtor. The application against it is declined.

c. Since there seems to be a dispute on the interest due, I direct that the parties do appear before the Deputy Registrar to settle the issue of interest and total amount due after the payment ordered in (a) above.

d. The applicant is awarded costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE